85-1006

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1985

Akhouri A. Sinha,
Petitioner,

vs.

Veterans Administration,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a Federal employee in competitive service may be demoted on the basis of job performance by means of a Reduction in Force, which is properly to be invoked only as the result of lack of work, shortage of funds, reorganization, insufficient personnel ceiling, or the exercise of re-employment rights.

Whether Petitioner was required to obtain research funding as a term and condition of his employment when his Employment Performance Appraisal had no such requirement.

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OPINIONS BELOW

The United States Court of Appeals for the Federal Circuit, whose judgment is herein sought to be reviewed, has issued an opinion in this case, a copy of which appears in the Appendix to this Petition at page 1. The opinion has not been reported. The prior opinion of the Merit Systems Protection Board appears in Appendix at page 17. This opinion has also not been reported.

JURISDICTION

The judgment of the Court of Appeals of the Federal Circuit was entered on July 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves 5 U.S.C. Section 3502, which is set forth in the Appendix at page 30, and 5 U.S.C. Section 4301, et. seq., which are set forth in the Appendix at page 32.

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STATEMENT OF THE CASE

This case concerns the demotion in grade and salary of a Federal employee in competitive service under the Civil Service Reform Act of 1978. At issue is the propriety of the use of a Reduction In Force (RIF) pursuant to 5 U.S.C. Section 3502 to achieve the demotion rather than the procedures set forth in 5 U.S.C. Section 4301 et. seq., the performance appraisal system. The statutes are set forth in Appendix at page 30.

Petitioner is a Ph.D. scientist who, in 1980, had been employed by the Veterans Administration Medical Center ("Medical Center") in Minneapolis, Minnesota for 11 years. His

position in 1980 was Research Physiologist, G.S.-14. He functioned both as Chief of the Research Electron Microscopy and Radioautography Laboratory, and as an independent researcher. Funding for Petitioner's research was obtained from the Veterans Administration Central Office in Washington, D.C. after review and approval of Petitioner's research proposals by the Merit Review Board, a group of independent scientists. Petitioner's personal salary was not included in the funding for the research but was budgeted independently by the Central Office.

In 1979, the Central Office distributed to the regional offices a circular which stated the Central

Office would continue to pay a researcher's salary "as long as the facility receives medical research support in his/her behalf or he/she has significant research support from extramural sources."[1] This policy was not explicitly incorporated in the critical elements of the performance standards the Veterans Administration had established for Petitioner's position pursuant to 5 U.S.C. Section 4301 et. seq. The requirement to obtain research funding was, however, a critical element of the performance requirements of a Research Scientist GS-15, a grade above that of Petitioner.[2] The circular expired February 11, 1980.

Dr. Sinha's field of research

was prostatic cancer. Prior to 1977, the Merit Review Board had recommended for funding two of Petitioner's research projects. In 1979, however, the Review Board did not recommend his current research proposal as being "too broad, too ambitious, and too diffused." The review panel recommended the application be resubmitted in 1980 with a more restricted focus. Dr. Sinha continued his research in 1979 with funding that had previously been obtained. That funding expired September 3, 1980.

In 1980, Dr. Sinha resubmitted his research proposal to the Merit Review Board. The application included virtually all of the suggestions made by the 1979 Board.

Prior to submission, the application had been reviewed by two area scientists and the Medical Center's Research and Development Committee. All had approved the proposal.

The 1980 Merit Review Board again did not recommend Dr. Sinha's application for funding. Petitioner then submitted his proposal to the Central Office Appeals Committee, which upheld the Merit Review Board's action. The Central Office thereafter notified the Medical Center it was withdrawing the funds to pay Petitioner's salary despite the funds having previously been budgeted.

Upon receiving this information the Medical Center's Research and Development Committee met to deter-

mine what action should be taken with respect to Petitioner. Of several options available, the Medical Center chose to abolish Petitioner's position through a RIF pursuant to 5 U.S.C. Section 3502, the basis for which was stated to be a shortage of funds.[3] The Medical Center notified Dr. Sinha of its decision by letter dated July 20, 1981, one year and five months following the expiration of the circular providing that funding was required to maintain a researcher's salary. In lieu of separation from service, the Medical Center offered Petitioner a GS-9 position, which Dr. Sinha accepted under protest.

Dr. Sinha appealed the Veterans Administration action to the Merit

Systems Protection Board ("Board") pursuant to 5 C.F.R. Section 351.901, which is set forth in the Appendix at page 21. Dr. Sinha contended his responsibility to obtain funding from the Merit Review Board was not a term and condition of his employment. He argued, alternatively, that if there was such a job requirement, any action brought to remove him should have been brought pursuant to 5 U.S.C. Section 4301 et. seq., the performance appraisal system, rather than by means of a RIF.[4] Petitioner also contended his research proposal was rejected by the Merit Review Board because it contradicted the prostatic cancer theory subscribed to by two of the three members of

the Review Board. If true, the resultant RIF was brought for reasons personal to Dr. Sinha.[5]

An initial hearing was held December 7, 8, 1981 before a presiding official from the Board's Chicago, Illinois Regional Office. In his decision of December 30, 1981, the presiding official found: 1) a shortage of funds existed; 2) Petitioner was required to secure research money as a term of his employment; and 3) The Agency properly reorganized and did not institute its RIF for reasons personal to Petitioner. The presiding official's opinion is set forth in the Appendix at page 10.

Pursuant to 5 U.S.C. Section 7701(a)(1), Dr. Sinha applied for

and was granted review of the decision by the full Board. In its decision set forth in the Appendix at page 17, the Board generally adopted the reasoning of the presiding official and affirmed his decision.

On November 21, 1985, Dr. Sinha applied to the United States Court of Appeals for the Federal Circuit for review of the Board's decision pursuant to 5 U.S.C. Section 7703. Dr. Sinha again contended the requirement to obtain funding for his research was not a term and condition of his employment. However, it if was, the Agency action to remove him should have been brought pursuant to 5 U.S.C. Section 4301 et. seq. rather than

through a RIF, and the sole notice he received was a shortage of funds. The Board's interjection of reorganization as the purpose for the RIF following the close of evidence was argued as arbitrary and capricious. Said contentions were presented in Petitioner's brief and upon oral argument. The United States Court of Appeals for the Federal Circuit held that while obtaining funding for Petitioner's research proposal was a term and condition of Petitioner's employment, the Agency's RIF action was nonetheless properly conducted for the reasons of shortage of funds and reorganization. The opinion appears in the Appendix at page 1.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED BY THE UNITED STATES SUPREME COURT.

This is a case of first impression for this Court. It involves the rights of Federal employees to the significant protection of the Performance Appraisal System of 5 U.S.C. Section 4301, et. seq. The Performance Appraisal System is one of several statutory means to terminate the services of a Federal employee.

Three primary methods exist to remove or demote a Federal employee, in competitive service, from their employment. These methods are Reduction in Force, 5 U.S.C. Section 3502, Actions on Performance Ap-

praisals, 5 U.S.C. 4301, et. seq., and Adverse Actions, 5 U.S.C. Section 7501 et. seq. A proper Reduction in Force is invoked only for reasons of lack of work, shortage of funds, reorganization, insufficient personnel ceiling, or the exercise of re-employment rights. 5 C.F.R. Section 351.201(a)(2). An adverse action (usually termination) can occur for such causes that will promote the efficiency of the service. 5 U.S.C. Section 7503(a). Finally, a Federal employee may be reduced in grade or removed for unacceptable job performance. 5 U.S.C. Section 4303(a).

The reason given by the Agency for the Reduction in Force (RIF) was

shortage of funds. The shortage resulted from the Agency's withdrawal of Dr. Sinha's salary after his research proposal was not recommended by the Merit Review Board.

There is no argument that the Agency withdrew Dr. Sinha's previously budgeted salary. The reason for the withdrawal of Dr. Sinha's salary is not disputed. The reason was his failure to obtain Merit Review Board approval of his research project. Finally, it is not disputed that Dr. Sinha would have retained his position had he obtained Merit Review Board approval.

The key question in this case was whether the withdrawal of Dr. Sinha's salary was related to his job performance or was a discre-

tionary managerial decision. A central issue in deciding the question is whether a shortage of funds really did exist.

The Federal Court of Appeals for the Federal Circuit found that securance of research funds was a de facto prerequisite of Dr. Sinha's position. Yet, the Court stated:

> The Petitioner was removed from his GS-14 position, not because his failure to obtain VA funding constituted unsatisfactory performance, but because the VA made the reasonable managerial judgment that it no longer wanted to pay for a researcher whose project the scientists on the Merit Review Board decided not to support.

In holding that obtaining research funds was a job requirement, the Court inexorably linked Dr. Sinha's job security to his

securing such funds. Failure to obtain the funds logically relates to his job performance. However, the Court of Appeals focused on the Agency's discretionary power to fund only meritorious research. In doing so, it reasoned, the Agency did not remove Dr. Sinha for performance but decided not fund a particular project. Petitioner does not question the Agency's authority to allocate funds to research it deems meritorious. Petitioner does assert error the Court of Appeals in not affording him performance appraisal rights.

Dr. Sinha was required to obtain research funding in order to maintain his employment. It is difficult to conceive how such a

requirement can be characterized as anything other than a job requirement. If the requirement is important enough that failure to satisfy it triggers employment termination, the requirement is certainly a critical element of the employee's position as defined in 5 U.S.C. Section 4302(b)(2).

The importance of distinguishing an Agency action for performance and one for reduction in force cannot be overstated. The Performance Appraisal System would afford Dr. Sinha the opportunity to correct any alleged deficiencies. 5 U.S.C. Section 4302(b)(6). He would be entitled to assistance from the Agency in remedying any claimed employment problem. 5 U.S.C.

Section 4302(b)(5). These rights have been held to be substantive by the Merit Systems Protection Board. Callaway v. Department of the Navy, M.S.P.B. No. PH04328310029 (10/22/84). Sandland v. General Services Administration, M.S.P.B. No. PH04328310205 (10/22/84). These important and significant rights would allow Dr. Sinha to obtain research funding from a source other than the Merit Review Board process. Numerous sources exist. An example is the American Cancer Society. In addition, the Agency would be required to assist Dr. Sinha in procuring other research funds. By conducting a Reduction in Force, directed solely at Dr. Sinha, the Agency circumvented those rights.

The basis for the Reduction in Force was "shortage of funds." The shortage of funds was asserted by the Medical Center in Minneapolis. There is no question that the Medical Center's salary budget was shorted by the withdrawal of Dr. Sinha's salary by the Veterans Administration's Central Office. However, it is not the Medical Center's action that is in question. At issue is the action of the Central Office. It withdrew Dr. Sinha's salary. It had been budgeted but was withdrawn. The shortage of funds claimed as the basis for the Reduction in Force was illusory. The reality of what occurred was a Reduction in Force,

targeted at one individual, because the individual failed to do something on his job that the Agency deemed of critical importance. This action was taken for reasons personal to Dr. Sinha. Such action is invalid. Losure v. Interstate Commerce Commission, 2 M.S.P.B. 361 (1980). Further, it deprived the Petitioner of his performance appraisal rights.

The Court and Agency tribunals below have failed to distinguish matters discretionary to the Agency and those bound by statute in the Federal employer/employee relationship. If this Reduction in Force is allowed to stand, serious consequences will result. Thousands of researchers employed by the Federal

government will have their employment performance standards controlled by external sources rather than by the Performance Appraisal Statute as was intended by the legislature. The rights, careers and job security afforded by the Federal Employment Statutes will lose significant import to these individuals. Thus, this case affects many individuals, including Dr. Sinha. Guidance is needed from this Court to provide a uniform and clear understanding of the rights of employees under the Federal Statutes.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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FOOTNOTES

[1] Exhibit "A" to Petition, which is set forth in the Appendix at page 44.

[2] Exhibit "B" to Petition, which is set forth in Appendix at page 48.

[3] 5 C.F.R. Section 351.201(a)(2) provides that a proper Reduction in Force may be invoked for reasons of lack of work, shortage of funds, reorganization, insufficient personnel ceiling, or the exercise of re-employment rights. A copy of the regulation appears in the Appendix at page 42.

[4] 5 U.S.C. Section 4301 defines the term "unacceptable performance" as that "performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position." The Agency justified its RIF proceeding on the failure of Petitioner to meet the standard set forth in the 1979 circular. Thus, although the requirement was not explicitly incorporated as a critical element of Petitioner's position, it was a term and condition of his employment. Failure to meet the requirement constituted "unacceptable performance" pursuant to Section 4301. The action to remove Petitioner from his position should have been brought pursuant to 5 U.S.C. Section 4303, "Actions based on

unacceptable performance," rather than through a RIF as failure to meet a performance standard is not a proper reason to invoke a RIF proceeding. Losure v. Interstate Commerce Commission, 2 MSPB 361 (1980).

[5] A RIF proceeding is invalid when motivated for reasons personal to the employee. Fitzgerald v. Hampton, 467 F.2d 755 (D.C.Cir. 1972), Losure v. Interstate Commerce Commission, 2 MSPB 361 (1980).

APPENDIX

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United States Court of Appeals

for the Federal Circuit

AKHOURI A. SINHA, Petitioner, v. VETERANS ADMINISTRATION, Respondent.	)	Appeal No. 84-1733

DECIDED: July 25, 1985

Before FRIEDMAN, NIES, and NEWMAN, Circuit Judges.

FRIEDMAN, Circuit Judge.

This petition for review challenges the decision of the Merit Systems Protection Board, affirming the petitioner's removal from his position as a Research Physiologist with the Veterans Administration (VA) through a reduction in force. We affirm.

I

The petitioner was employed by the VA Medical Center in Minneapolis, Minnesota (Medical Center), as a GS-14 Research Electron Microscopy and Radioautography Laboratory, and as an independent researcher. The Central Office of the VA supplied funds to the Medical Center to pay both his salary and the expenses of his independent research. To obtain the research funds, the petitioner had to obtain the approval of his research proposals by a Merit Review of the VA. The Merit Review Boards customarily disapprove -- and thus deny funding for -- approximately 20 to 40 percent of the projects submitted.

In 1979 the VA Central Office distributed to the regional offices a circular which stated that the Central Office would continue to pay a researcher's salary "as long as the facility

receives medical research support in his/her behalf or he/she has significant research support from extramural sources." This policy was not explicitly incorporated in the critical elements of the performance standards the VA had established for petitioner's position pursuant to 5 U.S.C. § 4031, et seq. (1982).

The petitioner's field of research was prostatic cancer. Prior to 1977, the Merit Review Board had approved two of his research projects. In 1979, however, the Board rejected the petitioner's latest research proposal as "too broad, too ambitious, and too diffused." In 1980, the petitioner submitted another research proposal to the Merit Review Road. This proposal attempted to meet the Board's criticism of his 1979 proposal. The Board also disapproved the 1980 proposal. The petitioner submitted

that proposal to the VA's Central Office Appeals Committee, which upheld the Merit Review Board's action.

Following the petitioners failure to obtain Merit Review Board approval of his 1980 research project, with its resultant termination of funds for this research, the VA Central Office advised the Medical Center that it no longer would provide the funds to pay the petitioner's salary. Upon receiving this information, the Medical Center's Research Service (of which the petitioner was a part) decided to abolish the petitioner's position through a reduction in force rather than to finance the position with funds from other portions of the Medical Center's budget or to eliminate other positions. By letter dated July 20, 1981, the Medical Center informed the petitioner of the reduction

in force, and offered him, in lieu of separation, a GS-9 position (in which he would retain his GS-14 grade and pay for two years). Petitioner accepted this demotion under protest and appealed the VA's action to the Merit Systems Protection Board (Board).

After a hearing, the presiding official, in what the Board described as "a thorough, careful and extensive initial decision," upheld the reduction in force. He held that the reduction in force was made for one of the reasons for which the governing regulation (5 C.F.R. §351.201 (a) (1983)) permits a reduction in force, namely, a "shortage of funds." Alternatively, the presiding official held that the reduction in force was taken for another permissible reason, namely, a reorganization. He found that "the agency has established

by a preponderance of the evidence that it properly initiated the reduction-in-force action at issue for reasons specified in 5 C.F.R. 351.201(a) and that it processed the action in accordance with relevant regulations."

The Board granted review, affirmed the presiding official's decision, and sustained the demotion. The Board stated

> that while the decision of the Research Service to invoke the RIF regulations was initially triggered by the withdrawal of research support money by the agency's Central Office, the record reveals that the agency had the option to retain [the petitioner's] position under alternative funding, but instead made the independently supportable discretionary decision to eliminate the position . . . . This decision clearly fell within the agency's management discretion regarding the planning of work and organization of the work force to accomplish agency objectives within available resources, see FPM chapter 351, subch. 1-5(a) and constituted a

proper reorganization as defined in 5 C.F.R. § 351-203(f).

II

The petitioner does not here challenge the decision of the VA to stop furnishing the Medical Center with funds to pay his salary after he had lost VA Central Office funding for his research activities as a result of the Merit Review Board's rejection of his 1980 research proposal. That decision involved the essence of agency management discretion. As the presiding official pointed out:

> Subchapter 1-5(a) of Chapter 351 of the Federal Personnel Manual indicates that an agency retians the responsibility and authority for planning the work and organizing the workforce to accomplish agency objectives within available resources; and that only the agency can decide to be located, and when they are to be filled, abolished, or vacated. If an agency is the repository for such authority, then the agency's determinations of how it will allocate its resources

are subject to deference.

The VA acted well within its discretion in deciding that it would no longer provide funding for the salary of a researcher whose projects were no longer being funded. The Board upheld the following conclusion of the presiding official:

> There is no impropriety in the agency's development of a funding policy which is consistent with the purpose of the Research Service and which is entirely within the agency's authority and responsibility: the pursuit of the most promising and worthwhile kinds of research.

A. The foregoing reasoning and analysis also require rejection of the petitioner's apparent contention that an asserted basis for the reduction in force -- a shortage of funds -- did not exist. The VA Central Office's termination of funding for the petitioner's

salary meant that the Medical Center no longer had available funds it theretofore had used to pay the petitioner's salary. It then had various choices: eliminating the petitioner's position, eliminating other positions and using the funds thereby made available to pay the petitioner's salary, or transferring funds from other sources to pay the salary.

The decision on which course to follow was also within managerial discretion. We agree with the presiding official and the Board that the Medical Center did not abuse its discretion in selecting the course it chose to follow of eliminating the petitioner's GS-14 position rather than continuing it at the expense of some other activity or positions it considered more important.

Realistically, the Medical Center's

decision to abolish the petitioner's position resulted from a shortage of funds because the Medical Center no longer had the funds to pay the salary of the position that the VA Central Office previously had supplied. The presiding official correctly noted that "[t]he result of the withdrawal of salary support [by the Central Office] was that there was a shortage of money for the specific purpose of funding the [petitioner's] position regardless of any surplus or discretionary funds which existed in the Research Service or elsewhere in the Minneapolis Medical Center or the Veterans Administration." The reduction in force thus was based upon a permissible ground under the regulation, namely, a "shortage of funds" and was valid. Bacon v. Department of Housing and Urban Development, 757 F.2d 265, 269

(Fed. Cir. 1985).

B. The petitioner contends, however, that the real reason for his removal was not a shortage of funds but his failure to obtain funding for his research projects; that this need to obtain funding was part of the duties of his position but was not included in his job description; that since he had not seen the 1979 circular stating the funding requirement, he was unaware of it; and that if he had been informed of the requirement, he might have been able to obtain funding for his project from outside the agency. He also argues that since his removal was based upon deficiencies in the performance of his duties (failure to obtain funding), the removal proceedings should have been brought pursuant to 5 U.S.C. § 431 et seq. (1982) (which governs removal for

"unacceptable performance") rather than accomplished through a reduction in force. As a corollary, he urges that the reduction in force was invalid because made for reasons personal to him. See Wilburn v. Department of Transportation, 757 F.2d 260, 262 (Fed. Cir. 1985); Keener v. United States, 165 Ct. Cl. 334, 338-39 (1964).

We agree with the presiding official's and the Board's rejection of this contention. As the Board stated:

> [T]he agency had properly made [the petitioner's] ability to obtain research support funds, either as a result of MRB [Merit Review Board] approval or his proposals or from extramural sources, a de facto prerequisite of his position. . . . While the MRB process inevitably entailed an evaluation of the substantive quality of [the petitioner's] research proposals, that element of the process does not lead us to believe, absent a showing of bad faith, that the RIF action which ultimately resulted therefrom was taken for reasons personal

> to [the petitioner] in circumvention of his adverse action procedural rights under 5 U.S.C. chapter 75.

The petitioner occupied an unusual position with the agency in that his independent research activities, to which the presiding official found that he devoted between 40 and 95 percent of his time, necessarily were dependent upon the availability of funds for their performance. The presiding official pointed out that

> the Chief of the Research Service testified that, regardless of whether this requirement for research support was stated in the [petitioner's] position description, essentially the entire budget for his service is determined by the ability of each independent researcher to obtain Merit Review support for his research programs . . . . In addition, he testified that the money for his service's budget comes listed under the name of each approved researcher . . . .

Thus, the Merit Review Board's decision not to provide funding for the petitioner's project was, in effect, a determination that the benefits of his independent research proposal, in comparision to those of other proposals the Board considered, did not warrant utilization of the agency's finite resources because, in the language of the VA's statutory duty, it held out less prospect of "contribut[ing] to the Nation's knowledge of disease and disability," 38 U.S.C. § 4101(c) (1982), than the projects it approved. The petitioner was removed from his GS-14 position, not because his failure to obtain VA funding constituted unsatisfactory performance, but because the VA made the reasonable managerial judgment that it no longer wanted to pay for a researcher whose project the scientists on the Merit Review

Board decided not to support.

The petitioner knew that the VA Central Office had supplied the funds to two of his prior research projects following the Merit Review Board's approval of those projects. For some years the VA apparently had followed the practice of requiring researchers to obtain Merit Review Board approval for their projects before they would fund them. It summarized that practice in the 1979 circular. The petitioner could hardly have been unaware that if the Merit Review Board did not approve his project, the Central Office's funding for his research would be eliminated and there would be no VA funds available for his research.

We cannot say that, considering all the circumstances, the Medical Center was barred from eliminating the petitioner's project when, as a result of the Merit

Review Board's disapproval of his 1980 proposal and the Central Office's consequent refusal to fund his research projects, the Central Office eliminated the funds to pay his salary. The Medical Center's action was a proper reduction in force since it was taken because of a "shortage of funds" and, as the Board explained, it also "constituted a proper reorganization" because it involved "the agency's management discretion regarding planning of work and organization of the work force to accomplish agency objectives within available resources . . . ."

CONCLUSION

The decision of the Merit Systems Protection Board sustaining the demotion of the petitioner by reduction in force is affirmed.

AFFIRMED

UNITED STATE OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

AKHOURI A. SINHA, appellant, v. VETERANS ADMINISTRATION, agency.	DOCKET NUMBER CH03518110610

OPINION AND ORDER

Appellant in this case was a GS-14 Research Physiologist whose duties included work on independent research projects. Funding for this research depended upon the ability of the person encumbering that position to submit, and obtain approval of, research project proposals to a Merit Review Board (MRB) within the agency's Medical Research Service. The MRB is a component of the agency's peer review process by which

decisions and recommendations are made concerning which research projects will be funded by the agency.

Appellant had submitted and obtained MRB approval for several research projects in the past. However, in 1979 and again in 1980, appellant's proposals for research projects were rejected by the MRB as being too broad, ambitious and diffused. Appellant appealed the rejection of his 1980 proposal to the agency's Central Office Appeals Committee, which concurred in the MRB's decision but recommended that appellant resubmit the proposal after some modification.

Following appellant's failure to obtain MRB approval of his 1980 research proposal, the agency's Central Office withdrew research funding support for the appellant's salary. When the agency's

Research Service was informed of this withdrawal, it decided not to finance appellant's position with funds drawn from other portions of the office's budget, but rather to abolish the position by application of reduction-in-force (RIF) procedures. In lieu of separation, appellant was offered, and accepted, assignment to the position of GS-9 Health Science Specialist, pursuant to 5 C.F.R. § 351.603, with grade and pay retention for two years.

Appellant asserted before the Board's Chicago Regional Office that the agency improperly applied RIF procedures in abolishing his former position; that the RIF action was the result of improper underlying motives; and that his competitive area was excessively narrow. Addressing appellant's appeal in a thorough, careful and extensive initial

decision, the presiding official concluded that preponderant evidence supported the propriety of the decision of the agency's Cost Center not to grant salary support for appellant's position following his failure to obtain MRB approval of his 1979 and 1980 research proposals, and that the resulting shortage of money for the specific purpose of funding his position was a proper basis for the RIF action under 5 C.F.R. § 351.201(a). The presiding official also concluded that the agency's exercise of its management discretion in eliminating appellant's former position constituted a proper reorganization within the definition of 5 C.F.R. § 351.203(f), and was also an appropriate basis for invoking the RIF regulations.

With regard to appellant's challenge of the bona fides of the RIF action, the

presiding official concluded, after detailed analysis, that the RIF action was the result of neither the bad faith disapproval of appellant's reserach proposals nor agency retaliation for his request for information regarding such disapproval pursuant to the Freedom of Information Act. He also determined that the GS-9 position to which appellant was demoted was significantly different from his former GS-14 position and, therefore, that appellant's claim that no actual reorganization occurred was without merit. Finally, the presiding official found that the agency's restriction of appellant's competitive area to the Minneapolis area was not improper. Appellant's petition for review challenging these findings is hereby GRANTED pursuant to 5 U.S.C. § 7701 (a)(1).

In his petition for review, appellant contends that the presiding official erred in finding that a shortage of funds, resulting from an agency's withholding of research support money, can be a proper basis for invoking RIF regulations under 5 C.F.R. § 351.201(a) and Federal Personnel Manual (FPM), ch. 351, subch. 1-5(a). He argues that the agency's policy making a portion of his salary contingent upon his ability to obtain approval of research proposals constituted a job performance requirement of which he was not aware and, thus, which he did not have a fair opportunity to fulfill.

We find, however, that appellant has not persuasively established error on the presiding official's part in finding that the agency had properly made his ability to obtain research support funds, either

as a result of MRB approval of his proposals or from extramural sources, a de facto prerequisite of his position. See Initial Decision at 5-6. While the MRB process inevitably entailed an evaluation of the substantive quality of appellant's research proposals, that element of the process does not lead us to believe, absent a showing of bad faith, that the RIF action which ultimately resulted therefrom was taken for reasons personal to appellant in circumvention of his adverse action procedural rights under 5 U.S.C. chapter 75. See Mead v. Department of Justice, MSPB Docket No. SE03518090004 (December 17, 1981); and Cody v. Department of Justice, 7 MSPB 127, 128 (1981). Cf. Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972); and Liguori v. United States Military Academy, 4 MSPB 100 (1980). Thus, we

find no reason to disturb the presiding official's conclusion that

> [t]here is no impropriety in the agency's development of funding policy which is consistent with the purpose of the Research Service and which is entirely within the agency's authority and responsibility: the pursuit of the most promising and worthwhile kinds of research.

Initial Decision at 7.

Further, we note that while the decision of the Research Service to invoke the RIF regulations was initially triggered by the withdrawal of research support money by the agency's Central Office, the record reveals that the agency had the option to retain appellant's position under alternative funding, but instead made the independently supportable discretionary decision to eliminate the position. See Hearing Transcript at 104. This decision clearly fell within the agency's management

discretion regarding the planning of work and organization of the work force to accomplish agency objectives within available resources, see FPM chapter 351, sub ch. 1-5(a), and constituted a proper reorganization as defined in 5 C.F.R. § 351.203(f).1/

1/ It is for this reason that we also reject appellant's contentions, raised for the first time in the petition for review, that: (1) the MRB system violated his constitutional due process right to confront those reviewers who determined whether his position would be eliminated or downgraded; and (2) the funding policy discrimnatorily applied only to Ph.D. researchers and not to M.D. researchers. Appellant's reduction in force in this case was the ultimate, but not inevitable, consequence of the MRB decision on the merits of his 1980 research proposal. Indeed, appellant's 1979 research proposal was also rejected, with no similar consequences. His demotion was, rather, the direct result of a considered management decision to reorganize the workforce and reallocate funds. Further, the record shows that M.D. researchers received salary support from difference sources than did Ph.D. researchers. Hearing Transcript at 105.

[Footnote continued on next page.]

Appellant also challenges the presiding official's conclusion that the MRB decision in particular and the RIF proceedings in general were bona fide and were not conducted for improper personal motives. Appellant's petition on this point is an extensive reiteration of all his arguments made below, challenging the presiding official's assignment of weight to, and inferences from, the evidence, and his factual and credibility determinations. Absent new and material evidence on these issues or persuasive demonstrations of error, the presiding official's findings, clearly made with care and pre-

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1/ [Footnote continued.]

therefore, appellant's allegations of procedural deficiencies in the MRB system and its funding processes are not directly germane to the issue of the propriety of the reorganization

cision in this case, will not be disturbed. See Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980).2/ Appellant contends in addition that the presiding official improperly shifted the ultimate burden of proof to appellant to show that the RIF was not bona fide, contrary to the Board's holding in Losure v. Interstate Commerce Commission, 2 MSPB 361, 366 (1980). In our view, how-

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2/ With regard to the appellant's assertion that the GS-9 position to which he was demoted was not significantly different from his original GS-14 job, the Board generally considers the duties and responsibilities of a job as documented in its position description, to be controlling in determining an employee's rights attendent to a reduction in force. Burbridge v. Goverment of the District of Columbia, MSPB Docket No. DC03518110150 (Sept. 27, 1982). See also Rael v. Government Printing Office, 5 MSPB 44, 45 (1981); and Callahan v. Environmental Protection Agency, 3 MSPB 536, 537 (1980). An employee's actual duties are those assigned by management to be performed on a

[Footnote continued on next page.]

ever, the fact that the presiding official found appellant's allegations insufficient to rebut evidence presented by the agency in establishing a prima facie case of compliance with the RIF regulations does not result in an improper shifting of the burden of proof. See Patrick v. Transportation, 6 MSPB 213, 215 (1981). Therefore, we can discern no reason to disturb the presiding official's findings regarding the bona fides of the RIF action against appellant.

2/ [Footnote continued.]

continuing basis. They do not include duties an agency may have assigned the employee on an acting basis, Bielec v. United States, 456 F.2d 690,696 (Ct. Cl. 1972), or as noted by the presiding official, duties the employee may have assumed on his or her own initiative. See Zucker v. Baer, 262 F. Supp. 528, 530-531 (S.D.N.Y. 1967).

Accordingly, we hereby AFFIRM the presiding official's initial decision of December 30, 1981, and SUSTAIN appellant's demotion by RIF. This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

SUBCHAPTER I. RETENTION PREFERENCE

§ 3501. Definitions, application

(a) For the purpose of this subchapter [5 USCS §§ 3501 et seq.], except section 3504 [5 USCS § 3504]-

(1) "active service" has the meaning given it by section 101 of title 37 [37 USCS § 101];

(2) "a retired member of a uniformed service" means a member or former member of a uniformed service who is entitled, under statute, to retired, retirement, or retainer pay on account of his service as such a member; and

(3) a preference eligible employee who is a retired member of a uniformed service is considered a preference eligible only if-

(A) his retirement was based on disability-

(i) resulting from injury or dis-

ease received in line of duty as a direct result of armed conflict; or

(ii) caused by an instrumentality of war and incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38 [38 USCS §§ 101 and 301];

(B) his service does not include twenty or more years of full-time active service, regardless of when performed but not including periods of active duty for training; or

(C) on November 30, 1964, he was employed in a position to which this subchapter [5 USCS §§ 3501 et seq.] applies and thereafter he continued to be so employed without a break in service of more than 30 days.

(b) Except as otherwise provided by this subsection and section 3504 of this title

[5 USCS § 3504], this subchapter]5 USCS §§ 3501 et seq.] applies to each employee in or under an Executive agency. This subchapter [5 USCS § 3501 et seq.] does not apply to an employee whose appointment is required by Congress to be confirmed by, or made with the advice and consent of, the Senate or to a member of the Senior Executive Service.

§ 4301. Definitions.

For the purpose of this subchapter [5 USCS §§ 4301 et seq.]-

(1) "agency" means-

(A) an Executive agency;

(B) the Administrative Office of the United States Courts; and

(C) the Government Printing Office;

but does not include-

(i) a Government corporation;

(ii) the Central Intelligence Agency, the Defense Intelligence

Agency, the National Security Agency, or any Executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counter-intelligence activities; or

(iii) the General Accounting Office;

(2) "employee" means an individual employed in or under an agency, but does not include-

(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) an indiviudal in the Foreign Service of the United States;

(C) a physician, dentist, nurse,

or other employee in the Department of Medicine and Surgery. Veterans' Administration whose pay is fixed under chapter 73 of title 38 [38 USCS §§ 4101 et seq.];

(D) an administrative law judge appointed under section 3105 of this title [5 USCS § 3105];

(E) an individual in the Senior Executive Service;

(F) an individual appointed by the President; or

(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter [5 USCS §§ 4301 et seq.] by regulations of the Office of Personnel Management; and

(3) "unacceptable perforance" means performance of an employee which fails to meet established performance

standards in one or more critical elements of such employee's position.

§ 4302. Establishment of performance appraisal systems.

(a) Each agency shall develop one or more performance appraisal systems which-

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for-

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the

basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

§ 4303. Actions based on unacceptable performance

(a) Subject to provisions of this section, and agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to-

(A) 30 days' advance written notice of the proposed action which identifies-

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the

employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally or in writing; and

(D) a written decision which-

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations

prescribed by the head of such agency extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee-

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee-

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection

with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, an entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled

to appeal the action to the Merit Systems Protection Board under section 7701 of this title (5 USCS § 7701].

(f) This section does not apply to-

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321 (a)(2) of this title [5 USCS § 3321 (a)(2)],

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted

service who has not completed 1 year of current continuous employment in the same or similar positions.

§ 351.201 Use of regulations

(a)(1) Each agency is responsible for determining the categories within which positions are required, where they are to be located, and when they are to be filled, abolished, or vacated. This includes determining when there is a surplus of employees at a particular location in a particular line of work.

(2) Each agency shall follow this part when it releases a competing employee from his or her competitive level by furlough for more than 30 days, separation, demotion or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, insufficient personnel ceiling, reorganization, or the exercise of reemployment rights or restoration rights.

Veterans Administration
Department of Medicine
and Surgery
Washington, D.C. 20420

Circular 10-79-26

February 12,1979

TO: Directors, VA Medical Centers, Medical and Regional Office Centers, Domiciliary, Outpatient Clinics and Regional Offices with Outpatient Clinics

SUBJ: Ph.D. Scientist Appointments in Medical Research (Program 821)

1. Recruitment of Ph.D. scientists or other nonclinician research scientists whose salaries will be supported by Program 821 funds will be on a temporary or term basis unless the scientist has been appointed Research Career Scientist by Veterans Administration Central Office or unless specific exception has been provided by the Director, Medical Research Service.

2. A moratorium on transfer of salaries to Cost Center 104 was effective March 15, 1977. Any individual now receiving salary support on Cost Center 104 will continue in this category as long as the facility receives medical research support in his/her behalf or he/she has significant research support from extramural sources. Such an investigator should not request salary support in the budget of a Merit Review Proposal.

3. Any nonclinician scientist with Program 821 salary support from a Cost Center other than 104 or 110 and who is applying for Merit review has the option to:

a. Request salary support as Principal Investigator or Co-principal Investigator (as defined in Circular 10-78-111). In the event of approval with sufficiently high priority, sal-

ary support will be provided in the new 103 program; the original salary support, if in an approved Cost Center 103 program, may be retained by the Principal Investigator of that program for the period of its Merit Review Approval.

b. Continue to receive total or partial salary support in another Cost Center (102, 103, 106, 107, 108, 109). If such support is derived from Cost Center 103 funds for a program in which his/her role is other than that of Principal Investigator or Co-principal Investigator, the funding for this program will not automatically be altered by approval of the nonclinician scientist's Merit Review Proposal. However, the facility may request that his/her salary funds be identified

with his/her program by transfer to the "Not Reviewed" category, in which case they will be deducted from the original 103 program. Restoration of the original 103 program may be requested on resubmission for Merit Review.

4. Medical facilities wishing to recruit nonclinician scientists to be salaried from Program 821 funds have the following options:

CIRCULAR EXPIRES FEBRUARY 11, 1980

Veterans Administration

Merit Pay

Performance Appraisal

APPRAISAL OF

EMPLOYEE'S NAME Grade Salary

Sinha, Akhouri A. GS-14

POSITION TITLE

Research Physiologist

DEPARTMENT OFFICE LOCATION

Research Service VAMC Minneapolis, MN

DATE ASSIGNED PRESENT POSITION

January 4, 1976

RATING PERIOD

FROM August 1, 1980 TO July 31, 1981

INSTRUCTIONS

The purpose of this form is to provide a standard framework for evaluating the performance of Merit Pay employees.

List the key responsibilities and designate the critical elements of the job. A critical element is defined as

any requirement of the job which is sufficiently important that inadequate performance of it outweighs acceptable or better performance in other aspects of the job. Performance standards should then be developed in Section A - Performance Planning.

At the end of the review period actual achievements as compared against the performance standards are recorded in Section B and a corresponding level of achievement determination is made. Accomplishments that have a significant positive impact on the job shall be described in Section C and below that a narrative summary of the employee's performance will be completed. An overall performance rating is then assigned in Section D.

When developing the performance plan

and describing/rating actual achievement, consideration will be given both individual performance and organizational accomplishment taking into account such factors as-improvements in efficiency, productivity and quality of work or service, including any significant reduction in paperwork; cost efficiency; timeliness of performance; other indications of the effectiveness, productivity and performance quality of the employees for whom the employee is responsible; meeting affirmative action goals and achievements of equal employment opportunity requirements, to the extent the employee's position involves such responsibilities. Where applicable, these factors will be expressed in the performance standards and evaluated in the actual achievement section.

In Section D of this form the employ-

ee may elect to make any written comments desired regarding the appraisal and rating.

PERFORMANCE REQUIREMENTS

RESEARCH SCIENTIST: GS-13/14 10/30/80

I. ADVANCEMENT OF KNOWLEDGE AND PRODUCTIVE INTERACTIONS WITHIN THE RESEARCH AND CLINICAL SITUATION

1. Serves as an important resource by being asked once a year to provide collaboration/consultation by other research investigators and/or clinicians. Has a recognized reputation for willingness and availability for such consultations.

2. Is involved in review process once a year. This includes proposal critiques, service on review boards, review of journal or book submissions, or other

peer review procedures.

3. If applicable, manages a core laboratory facility which is available to all investigators. Effectiveness and efficiency are judged in terms of cost-effectiveness and absence of valid investigator complaints.

4. If applicable, is actively involved in intra- or extramural teaching activities. Active involvement may also be evidenced by interactions with students/fellows (advising).

5. Serves (or has served) at least one term (two years) on the Research and Development Committee (or any of its subcommittees), or provides (to the research program) other means of administrative support as defined and ap-

pointed by the ACOS Research.

II. DEFINING AND FORMULATING IMPORTANT RESEARCH PROBLEMS (CRITICAL ELEMENT)

1. Demonstrate ability to define a research problem in one or more areas of investigation, including background search, costs, and protocol plan. This is evaluated in terms of the ability to publish or assist in the publication of the results of this work in refereed journals. The requirement is actual publication in refereed journals of one paper per year, as calculated in a three year moving average (abstracts excluded).

III. EXECUTION OF THE RESEARCH PLAN

1. If applicable, develop innovative methodologies in the execution of the investigative

plan that allow for achievement of ultimate research objectives.

2. Gather data according to research protocol and analyze results so as to result in publication productivity.

3. If applicable, supervise the contributions of research associates/assistants in executing the plan so that productivity is assured. This includes that ability to manage projects so that stated research objectives are met and to generate or assist in the generation of support.

IV. SCIENTIFIC CONTRIBUTIONS

1. Publish papers in refereed journals that contain data of originality, soundness and value so that they identify him/her as

significant contributor.

V. MANAGEMENT OF RESEARCH RESOURCES AND THE RESEARCH PROGRAM

1. Assure reference to guidelines and policies formulated by the Safety Committee and subcommittees of the Research and Development Committee.

2. All research proposals will be submitted by the administrative deadlines established. With appropriate advance notification by the administration, established deadlines for reports will also be observed. This includes progress, RDIS, personnel, and other reports as requested.